Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-1799

MAHMOOD MOHAMMAD, M.D.,
CALVIN H. CURRY, JR., M.D.,
EDWIN D. CRANE III, M.D.,
J. HOWARD GRINER, M.D.,
H. HUTSON MESSER, M.D., and
GEORGE S. PALMER, M.D.,

Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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MAHMOOD MOHAMMAD, M. D. et al.,
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Feminist Women's Health Center, respectfully requests that this Court deny the petitions for writs of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 586 F.2d 530.

The Respondent would adopt the Opinion Below, Jurisdiction, Questions Presented, Statute Involved and Statement of the Case as presented in the Petitioners' Petitions for Writ of Certiorari.

REASONS WHY THE WRIT OF PETITIONER PALMER SHOULD BE DENIED

POINT I.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are in fact present.

Second, this issue is based on a misapprehension of applicable law. There is no legal requirement that Dr. Palmer be a competitor to be liable for participation in a conspiracy to violate the Sherman Anti-trust Act. *See, In re Multistate vehicle Air Pollution,* 481 F 2d 122 (9th Cir. 1973); *Checker Motors Corp. v. Chrysler Corp.,* 405 F. 2d 319 (2d Cir. 1968); *Travelers Inc. Co. v. Blue Cross,* 481 F. 2d 80 (3d Cir. 1973); *Loewe v. Lawlor,* 208 U.S. 274, 293-96 (1908).

Third, the Petitioner neglects to inform this Court that this issue was fully and specifically raised before the Court of Appeals in his petition for Rehearing En Banc filed January 8, 1979. Being fully appraised, the Fifth Circuit saw no reason to modify its opinion. Palmer Petition, p. 53a.

POINT II.

First, the only consideration governing review on certiorari reflected in Supreme Court Rule 19 and asserted by Petitioner Palmer is that this issue is of exceptional importance.

Second, the Court of Appeals did not *"completely abandon the appropriate legal concept of summary judgment in favor of an absolute requirement of trial by jury . . . . "* Palmer

Pet., p. 11. Rather, the Court of Appeals was mindful of the decisional law of this Court with regard to the impropriety of summary judgment where there are questions of intent and motive at issue.

> The Crucial factual dispute concerns the characterization of Palmer's conduct. This involves elusive questions of intent and motive, the type of questions that, the Supreme Court has warned, should seldom be disposed of by summary procedures. *Poller v. Columbia Broadcasting System, Inc.*, 1962, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458.
>
> Palmer Petition at p. 36a.

There is a most unfortunate misrepresentation on page 10 of the Petition. The Petition states:

> This conclusion is reached in spite of the Court's findings that Dr. Whaley left the Center based upon the advice of several people and what he felt to be beneficial to himself. This conclusion is also reached despite the fact that the Court found that Dr. Whaley looked upon petitioner Palmer's advice as *"helpful"* and uncoercive. (37a)

In fact, the Court of Appeals stated:

> On the contrary, Whaley's account of the telephone conversation could be reasonably construed as suggesting that Palmer's call

> contributed to Whaley's decision to leave the clinic. The causation issue is surely not disposed of by Whatley's characterization of Palmer's advice as *"helpful"* and uncoercive. Nor does Dr. Whaley's account resolve issues concerning Dr. Palmer's state of mind.
>
> Palmer Petition at p. 37a.

POINT III.

This Court's decision in *Butz v. Economou*, 98 S. Ct. 2894 (1978), changed no rule of law that has any bearing on this Petition for Writ of Certiorari. *Butz* deals with the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violation of a citizen's constitutional rights in the context of an administrative proceeding.

Absolute immunity is available only to officials when exercising a judicial, prosecutorial or legislative function during the course of the administrative proceedings. *See also, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1179, n. 30 (1979).

The *Parker v. Brown*, 317 U.S. 341 (1943), immunity concept is totally unrelated and based on differing considerations than the *Butz* immunity rationale.

The Court of Appeals was mindful of immunity issues in its opinion. The argument on page 13 of the Petition seriously misrepresents the ruling of the Court of Appeals, because it fails to disclose any of the panel's thoughtful analysis reflect-

ed in the opinion. See Petitioner Palmer's Pet., pp. 41a-45a. There is careful analysis of the statutory authority enjoyed by Defendant Palmer, Pet., pp. 42a-44a.

Most notably, the Petitioner fails to disclose his own sworn testimony to this Court:

> . . . Dr. Palmer stands impeached by his own characterization of the Whaley call. In his deposition, Palmer stated that he told Dr. Whaley that *"[t] his is a personal call to you concerning your activities in Tallahassee."* Although Palmer's characterization of the call does not estop him from now arguing that the call was official business, it is certainly strong evidence that it was not.
>
> Palmer Petition, p. 44a.

CONCLUSION

Essentially, Petitioner Palmer has not presented any question to this Court worthy of granting certiorari. There has been no demonstration of why it is necessary or important for the lower court decision to be reviewed by this Court, and therefore, the Petition should be denied.

REASONS WHY THE WRIT OF PETITIONERS MOHAMMAD ET AL. SHOULD BE DENIED

Point I.

First, none of the considerations governing certiorari review by this Court as reflected in Rule 19 on the Supreme

Court Rules are cited by the Petitioners, and in fact, none are present.

Second, read most favorably for the Petitioners, the Petition merely creates an *intra*-circuit decisional conflict. If this conflict did exist, it would be appropriately resolved by the United States Court of Appeals for the Fifth Circuit. See Rule 35, Federal Rules of Appellate Procedure; Local Rule 12, United States Court of Appeals for the Fifth Circuit. Obviously, the Fifth Circuit did not find any conflict with its prior pronouncements as it denied Petitioners' Petition for Rehearing En Banc.

Third, how subject matter jurisdiction under the Sherman Act, Title 15 U.S.C. § 1, is determined necessarily means:

> [t]here is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts. *Rasmussen v. American Dairy Ass'n.*, 472 F. 2d 517, 526 (9th Cir. 1973), *cert. denied*, 412 U.S. 1950 (1974)
>
> *St. Bernard Gen. Hosp., Inc. v. Hospital Service Assn.*, 510 F. 2d 1121, 1126 (5th Cir. 1975).

All the evidence in this regard having been previously adduced and found to support Sherman Act jurisdiction, it is clear that this Court will not grant certiorari to review evidence or inferences drawn from that evidence. *General Talking Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175 (1938).

Fourth, the Fifth Circuit found it unnecessary to resolve a conflict over whether the receipt of Medicaid payments by the Respondent should have been considered by the district court as a proper component of the Respondent's interstate commerce connections. Mohammad et al, Petition, p. 16a, n.2. It is clear that these moneys, considered alone or as one of the "*combination of factors,*" *Hospital Building Co. v. Trustees of Rex hospital,* 425 U.S. 738 (1976), can be the basis for Sherman Act subject matter jurisdiction. *See, Alabama Optometric Association v. Alabama State Board of Health,* 379 F. Supp. 1332 (M.D. Ala. 1972); *Zamiri v. William Beaumont Hospital,* 430 F. Supp. 877 (E.D. Mich. 1977); *DeGregorio v. Segal,* 443 F. Supp. 1257 (E.D. Pa. 1978).

POINT II.

First, the Petitioners allege that the Fifth Circuit's decision directly conflicts with *Gulf oil Corp. v. Copp Paving Co., Inc.,* 419 U.S. 186 (1974). However, the substantive statute in *Gulf Oil* was the Clayton Act, Title 15 U.S.C. § 13 (a), which included a separate and distinct minimal jurisdictional basis, Title 15 U.S.C. §§ 14 and 18, and which is entirely different from § 1 of the Sherman Act. In fact, the history of the case shows that the district court dismissed the Sherman Act claim as well as the Clayton Act count. The appeals court reversed as to both, 487 F. 2d 202 (9th Cir. 1973). Only the Clayton Act cause of action reached this Court for decision. The determination by this Court specifically drew the distinction between these two anti-trust causes of action. 419 U.S. 186, 194-97. Therefore, no conflict can exist.

Second, the Fifth Circuit did not create a *"novel"* jurisdictional standard for Sherman Act antitrust cases. The language used by the Fifth Circuit that the Petitioners complain of is the accepted legally sufficient test. *See, Burke v. Ford,* 389 U.S. 320 (1967). *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F. 2d 48 (3d Cir. 1973), stated:

> The Court ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce.

See also, Boddicker v. Arizona State Dental Assn., 549 F.2d 626, 629, n. 4 (9th Cir. 1977).

As the citation indicates, the cases cited by the Fifth Circuit are merely illustrative of the legal concept. This is, of course, in further recognition of the unique character of each factual situation when a federal court determines the existence of Sherman Act subject matter jurisdiction.

POINT III.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they in fact present.

Second, even if the Fifth Circuit had erred, which it did not, the case would not be appropriate for granting of certiorari because the Florida statute at issue, Section 458.1201 (1)(p), Fla. Stat. 1977, is esoteric, and the application of *Noerr-Pennington* to its provisions is not *"an important issue of federal law which has not been, but should be, settled by this court . . . ."* Supreme Court Rule 19.

The Florida Medical Regulation Scheme

The *only* public attribute of medical societies and hospitals in the statewide regulatory framework is their responsibility to report any disciplinary action they may take to the state Board of Medical Examiners. As the Fifth Circuit noted, the existence of these reports in no way mandates any action or even process by the Board of Medical Examiners. Mohammad et al Pet., pp. 29a-30a.

The president of the medical society stated that *"my assumption would be that it's a private organization."* A769; D#365 at 17 [1]:

> He further testified as to the informality of CMS [Capital Medical Society] internal procedures (A771, 772 and 777, 778; D#365 at 19-20 and 45-46). Wood also stated that there is no formal relationship between CMS and BOME [Board of Medical Examiners] and in fact had no communication with the BOME regarding the operation of CMS (A775; D#365 at 23).
>
> Diane Pickett, Executive Secretary of CMS, confirmed the private nature prespective of the CMS hierarchy (A389, 390; D#235 at 6-7).
>
> For an extensive discussion of the role of medical societies in restricting services and promoting anti-competitive policies, see Amicus Brief of American Public Health Ass'n. et al, pp. 25-29.
>
> Appellant's Brief, p. 42.

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1. Citations are to Appellant's Brief in the Fifth Circuit – A - Appendix; D - Depositions not included in Record proper.

Any intimation that this analysis is not correct raises other grave issues which the Court of Appeals did not have to reach. If the Legislature intended to confer public or quasi-public status on professional medical organizations or hospital staffs through the passage of Section 458.1201 (1)(p), such was an unconstitutional delegation of power under Article III, Section I, Florida Constitution. See Appellant's Brief, pp. 44-46. The statute fails to establish any procedural safeguards. The Florida Constitution mandates that such administrative functions be exercised only by duly commissioned officers. *Dade County v. State of Florida,* 116 So. 72 (Fla. 1928). The Court of Appeals did not have to reach this question.

An even more serious shortcoming of the defense is that the kinds of communications made by the Defendants to the various medical bodies were not the kinds of communications protected by *Noerr-Pennington.* Appellant's Brief, pp. 46-51. The Court of Appeals did not have to reach this question.

Additionally, the conspiracy between the OB-GYN defendants and the Capital Medical Society precludes *Noerr-Pennington* protection for communications with that body. Appellant's Brief, pp. 51-53. The Court of Appeals did not have to reach this question.

Lastly, even if the *Noerr-Pennington* analysis of the Petitioners were correct, the summary judgment would have to be reversed because there were so many triable issues of fact on which the jury could find sufficient evidence of proof of the anti-trust conspiracy. Appellant's Brief, pp. 35-38. The Court of Appeals did not have to reach this question.

The formulation of Group Communication

This point is *de minimus.* In no way did it control the result.

This point is a classic case of taking a one-sentence statement in an opinion out of an extremely complex factual setting and crying *"wolf."* The petitioners cite to no specific discussions for which they seek protection. The reason for this strategy is clear. There is a very large body of evidence of actual conspiratorial activity by the Petitioners. From this concerted activity over a year and a half emerged (a) one single communication to the Board of Medical Examiners (arguably protected), (b) several communications to bodies correctly held by the Court of Appeals not to be protected, but (c) a preponderant majority of communications and coercions which were not protected even under the Petitioners' most extreme theories.

Rather than burden this response with what would necessarily be a very long factual recitation, with the Court's permission, we will merely cite to certain portions of the Brief of the Appellant in the Court of Appeals. The Statement of Facts is from pages 3 to 28. Pages 35-38 contain an analysis showing that the great bulk of the discussions were held prior to any *"petitioning"* and that it was these, certainly not the one arguably protected petition, that visited the damage on the Respondent Feminist Women's Health Center.

POINT IV.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they argued.

In the context of the instant case, the rule of law on which the Petitioners complaint constitutes (to the extent one can quantify) perhaps 5% of the overall evidence of conspiracy to restrain trade.

The position of the Court of Appeals (Mohammad et al. Petition, p. 24a) is abundantly correct. The district court took one possible configuration of proof of sham from this Court's opinion in *Otter Tail Co. v. United States,* 410 U.S. 366 (1973) and held, contrary to this Court's earlier opinion in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), that the *Otter Tail* configuration of proof was the only one availing of the plaintiff seeking to prove *"sham."* The Court of Appeals noted simply and correctly that proof of a pattern of repetitive, baseless claims is not essential to proof of sham.

The only error of the Court of Appeals on this point is one which inured to the *benefit* of the Petitioners. The Court should have ruled that because the OB-GYN Defendants were conspiring with the Executive Director of the Board of Medical Examiners, no *Noerr-Pennington* defense could be interposed, regardless of sham. This point was raised in the Appellant's Brief, pp. 51-53.

In *California Motor Transport, supra,* the Court indicated certain circumstances under which *Noerr-Pennington* would not apply:

> *. . . Conspiracy with a licensing authority to eliminate a competitor may also result in an anti-trust transgression. Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L. Ed. 2d 777; *Harman v. Valley National Bank,* 339 F. 2d 564, (CA 9 1964).
>
> 404 U.S. 508, 513 (emphasis added).

Accord, *Duke & Co. v. Foerster,* 521 F. 2d 1277 (3d Cir. 1975).

In *Continental Ore Co. v. Union Carbide & Carbon Corp., supra,* this Court rejected the claim of *Noerr-Pennington* protection for communications of private defendants with a defendant co-conspirator Electro Met which exercised exclusive purchasing agent for vanadium for the Canadian Government. See also *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961).

The Court of Appeals did not reach this issue.

POINT V.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they in fact present.

This is a frivolous point.

The economic realities of the situation are clear. Prior to the coming of the Health Center in the spring of 1974, the Defendant doctors and their OB-GYN colleagues, who are named as non-defendant co-conspirators, did have monopoly power over first trimester abortions. The Health Center did perform more abortions than the Defendant doctors, but unlike the Defendants, it was in a peculiarly vulnerable posture in the market. Because the Plaintiff is a non-profit corporation, it cannot perform any abortions without a licensed physician. The Defendant doctors succeeded in pressuring out Drs. Mc Williams, Whaley and Rhett.

Had the Health Center at any time failed to gain another doctor, the Defendant doctors and their OB-GYN colleagues would have again enjoyed monopoly power. Thus, there is clearly a *"dangerous probability"* of monopolistic success.

CONCLUSION

Essentially, petitioners in both petitions have not presented any question to this Court worthy of granting certiorari. There has been no demonstration of why it is necessary or important for the lower court decision to be reviewed by this Court, and therefore, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Respondent's Brief in Opposition were mailed to the following persons this 21st day of September 1979.

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